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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

LOUIS LUPO,

Petitioner,

vs.

THE NORFOLK & WESTERN RAILWAY COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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QUESTION PRESENTED FOR REVIEW.

The only question presented by the petitioner in this case is whether the Court of Appeals and the Court of Common Pleas of Franklin county, Ohio were correct in their decisions that the plaintiff had not introduced sufficient evi-

dence of any negligence on the part of the respondent to require that the case be submitted to the jury for its deliberations. Questions numbers two and three as listed by the petitioner (Petition, p. 4) are misleading interpretations of this single issue, argumentative in nature, and fail to accurately reflect the evidence presented in the trial court.

STATUTES INVOLVED.

The statement of the petitioner with respect to the statutes involved is incorrect. Section 54 of the Federal Employers' Liability Act, dealing with assumption of risk, Title 45, U. S. C., Section 54, is not involved in this case, contrary to the claim of the petitioner (Petition, p. 6). Such a defense was not pleaded and was not at any time mentioned during the course of the trial. The decisions of the lower courts were based solely upon the insufficiency of the evidence presented by the petitioner and not upon any special defenses of the respondent.

STATEMENT OF THE CASE.

The pleadings and the testimony of the petitioner's own witnesses established the following uncontradicted facts. The respondent operates and maintains certain tracks, yards and facilities in and near Columbus, Ohio, as a part of an interstate railroad (admitted by the respondent's answer). The Columbus yard covers a large area and contains miles of track within its boundaries (R., 62). The work of the employees at the yard must be carried on day and night, seven days a week, regardless of the weather (R., 63, 64). In January, 1951, there were approximately 400 to 475 employees of the respondent working in and about the yard (R., 73, 74), including engineers, firemen,

conductors, brakemen, car inspectors, trackmen, signal men, track walkers, switch cleaners, mechanics, engine supply men and other laborers (R., 62, 63). Practically all of those employees walked around the yard at different places, carrying on the everyday business of railroading (R., 63), regardless of the weather (R., 74).

One of the duties of the petitioner as an engine supply man was to service engines that were doubling over from one shift to another (R., 99). A doubling over engine is one which is used to shift cars around the yard and from the yard into various plants and industries in and around the Columbus area (R., 64). Its work includes the delivery of perishable merchandise to various warehouses (R., 64-a). After being used for one eight-hour period, it comes into the yard on the south incoming track or penstock track, hereinafter referred to as the incoming penstock track, where it receives water from the penstock or water pipe located on that track. The coal and sand are checked there and the engine supply men give the engine a minor lubrication there (R., 64-a, 65), which takes only five to ten minutes (R., 14). This minor servicing is done by the engine supply men at the same time the engine is taking on water at the penstock (R., 64-a, 65, 66). The only place that an engine can take on water is at a penstock out in the yard (R., 65), and the minor lubrication is done simultaneously in order that the engine can go immediately back into service (R., 66). The crew for the next shift is waiting at the penstock to put the engine back into service at once (R., 42, 64, 64-a). An engine of this type is needed right away, and in five to ten minutes the minimum servicing can be done at the incoming penstock track and the engine put back into service, moving out with a new crew in a reverse movement (R., 15, 24, 39, 49, 64, 64-a). As many as four such engines were "doubled" at the beginning of

each shift at the incoming penstock track (R., 57), receiving the minor servicing described above. Other engines which had to be completely serviced were taken to the inspection pits or roundhouse (R., 43). Those needing heavy repair work were taken into the roundhouse (R., 14, 43).

The engine supply men who serviced doubling over engines at the incoming penstock track out in the yard walked to that track from various locations (R., 44), taking whatever route through the yard happened to be available at any particular time, depending upon their point of origin and upon the changing conditions in the yard (R., 23, 44, 59, 67, 68, 103). It was impossible for any fixed route to exist through the yard area due to the continuous movement of engines and cars and the placing of equipment at different locations on the tracks (R., 44, 59, 67, 68). On the day in question, the petitioner and a fellow employee had serviced a doubling over engine at the incoming penstock track and were returning to the roundhouse when the petitioner slipped on a tie while crossing one of the tracks in the yard area (R., 84, 87, 103). A mixture of sleet and freezing rain was then falling, resulting in ice, slush, or settled snow being on the ground (Plaintiff's Exhibit A; R., 86, 100, 103, 113, 114).

The petitioner refers to an alleged conflict in the evidence concerning whether the doubling over engines had on occasion ever been given the same minor servicing either in the roundhouse or on tracks nearer to the roundhouse than the incoming penstock track (Petition, p. 9). The record, however, shows that every witness called by the petitioner, including the petitioner himself, who testified as to the place and manner in which doubling over engines were serviced, testified that such engines were always serviced on the incoming penstock track (R., 42, 43, 49, 50, 57,

58, 59, 60, 91). The testimony of the petitioner (R., 91) and Mr. Clark (R., 39) was self-contradictory in this respect, but even if those fragments of self-contradiction could be considered as having any probative value, they would be evidence of only one thing, namely, that doubling over engines on occasion had been serviced in the roundhouse sometime in the past. The petitioner, realizing this, makes the statement that "irrespective of what respondent did as a matter of practice, the locomotives could have been serviced either in the roundhouse or on the inspection track close to the roundhouse." (Petition, p. 10). No reference, however, is given by the petitioner to any part of the record in support of this claim, for the reason that there was absolutely no evidence presented at the trial to prove that at the time in question this doubling over engine *could* have been placed in the roundhouse or on tracks nearer to the roundhouse.

Although there was no evidence that on the day in question there was any space available in the roundhouse or that the engine could have been moved from the incoming penstock track, the record does show that at that time there was snow or sleet over the entire yard (R., 102), including in and around the inspection pit (R., 102), the washrack track (R., 102), and even inside the roundhouse itself (R., 77). Furthermore, moving the engine for the benefit of the petitioner, if that had been possible, would have required other employees of the respondent to walk through the yard for a greater distance than when the engine was more centrally located at the incoming penstock track (R., 72, 73). The work was performed in exactly the same manner that it had always been done (R., 68, 69).

In the petition for writ of certiorari a statement is made that "no salt or abrasive was spread upon any part of the area involved (R., 75)." (Petition, p. 9). There was, how-

ever, no evidence whatsoever presented at the trial concerning any abrasive. The only evidence with respect to salt was that it had *never* been used in the yard area (R., 75). *The record conclusively shows that it was physically impossible for any fixed paths to exist in this area between the incoming penstock track and the roundhouse, due to the normal movement of engines and cars and the placing of equipment at different locations on the various intervening tracks* (R., 44, 59, 67, 68). Employees walking through this area necessarily took whatever route happened to be available at any particular time, their course of travel being continuously dependent upon the changing conditions in the yard (R., 23, 44, 59, 67, 68, 103).

At the conclusion of the petitioner's case, the trial court, distinguishing the present action from one under the Ohio Workmen's Compensation Law, held that there had been no proof of negligence which is necessary under the Federal Employers' Liability Act and therefore sustained the motion of the respondent for a directed verdict (R., 116-119). That decision was unanimously affirmed by the Court of Appeals of Franklin County, Ohio (Petition, App. B).

The decisions of the trial court and the appellate court are supported by logic, fundamental principles of law, and abundant authority.

ARGUMENT.

Summary.

It is axiomatic that an employer under the Federal Employers' Liability Act is not an insurer of the safety of its employees, that there is no burden upon the employer to furnish its employees with a place to work which is absolutely free from all danger or risk of harm, and that in the absence of affirmative proof of negligence, the employer cannot be held liable for damages arising from an employee's accident. Title 45, U. S. C., Section 51; *Moore v. Chesapeake & Ohio Railway Co.*, 340 U. S., 573; *Eckenrode v. Pennsylvania R. Co.*, 335 U. S., 329; *Brady v. Southern Ry. Co.*, 320 U. S., 476.

Contrary to the petitioner's belief, there is no unqualified right to have his case presented to the jury. The weight of the evidence under the Federal Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the jury. *Brady v. Southern Ry. Co.*, 320 U. S., 476. Each case, therefore, must necessarily depend upon the particular evidence presented, and the accusations made by the petitioner that the lower courts failed to consider all of the evidence in the case or failed to apply certain principles of law are completely unfounded.

The authorities relied upon by the petitioner are clearly distinguishable on the facts and no principle enunciated in any of them has been violated by the Ohio courts. There is no imposition of liability on the part of the respondent for injuries resulting solely from the mere existence of ice and snow on its premises. *Raudenbush v. Baltimore & O. R. Co.*, 160 Fed. 2d, 363; *McGivern v. Northern Pac. Ry. Co.*, 132 Fed. 2d, 213.

The decisions in the present case resulted from the lower courts adhering to their responsibility under the law to honestly rule upon the sufficiency of the evidence presented by the petitioner. The case does not involve any general principle requiring pronouncement by this court and no special or important reasons exist for a review on writ of certiorari. *Revised Rules of the Supreme Court of the United States, Rule 19.*

Petitioner's Questions Nos. 1, 2 and 3.

Although the petitioner has attempted to frame three issues based upon his own interpretation of the evidence, there actually is only one question which could be presented for review, namely, whether the lower courts were correct in holding that the petitioner had failed to present sufficient affirmative evidence of negligence to justify submitting the case to the jury. The application of fundamental principles of law to the particular evidence presented supports the conclusion which was reached by the trial court and unanimously affirmed by the appellate court.

The respondent is not an insurer of its employees, inasmuch as liability under the Federal Employers' Liability Act arises from negligence, not from injury. Title 45, U. S. C., Section 51; *Moore v. Chesapeake & Ohio Railway Co.*, 340 U. S., 573; *Brady v. Southern Ry. Co.*, 320 U. S., 476. It was the responsibility of the lower courts to apply the negligence test honestly and not to pretend that there was sufficient evidence of negligence when none had been presented. *Eckenrode v. Pennsylvania R. Co.*, 164 Fed. 2d, 996, *affirmed*, 335 U. S., 329. This Court, in *Brady v. Southern Ry. Co.*, 320 U. S., 476, 479, very clearly prescribed the standard against which the evidence must be tested upon a motion for a directed verdict in Federal Employers' Liability Act cases:

> "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the

case may be properly left to the discretion of the trier of fact—in this case, the jury. *Western & Atlantic R. Co. v. Hughes, supra; Baltimore & Ohio R. Co. v. Groeger*, 266 U. S. 521, 524. Cf. *Gunning v. Cooley*, 281 U. S. 90, 94; *Commissioners v. Clark*, 94 U. S. 278, 284. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. *Galloway v. United States*, 319 U. S. 372; *Pence v. United States*, 316 U. S. 322; *Baltimore & Ohio R. Co. v. Groeger*, 266 U. S. 521, n. 1; *Anderson v. Smith*, 226 U. S. 439; *Coughran v. Bigelow*, 164 U. S., 301, 307; *Gunning v. Cooley*, 281 U. S. 90, 93, note; *Seaboard Air Line v. Padgett*, 236 U. S. 668, 673; *Parks v. Ross*, 11 How. 362, 373. See IX Wigmore on Evidence (3d ed., 1940), Sections 2494 *et seq.*"

The petitioner claims that all of the evidence was not considered because the trial court, in the remarks made to the jury after the close of the petitioner's case, did not discuss in detail all of the particular aspects and interpretations which are now suggested by the petitioner (Petition, pp. 13, 14). The technique of tearing an excerpt of the remarks from its context is futile when the record itself is examined. The validity of the decisions of the lower courts rests upon the record, and not upon the petitioner's strained analysis of an excerpt from the trial court's remarks. There can be, however, no question but that the duty of the respondent was clearly recognized by the trial court in the following statement (R., 118):

> "Now the Employers' Liability Act limits the railroad company's liability to acts of negligence, that is, to failure to exercise ordinary care, and ordinary care

> with respect to railroads is the highest degree of care compatible with the business in which they are engaged. The court, convinced that no negligence of the defendant has been shown, must sustain the motion and direct the jury to return a verdict for the defendant."

It would unduly encumber this brief to point out in detail the distinguishing facts in the cases cited by the petitioner. In each of them, however, there was in fact and law an evidentiary basis for allowing the case to go to the jury which is completely absent in the present case. In *Schulz, Administratrix, v. Pennsylvania R. Co.*, 350 U. S., 523, there was abundant proof of negligence based upon the failure to furnish adequate lighting and sufficient assistance. In *Fort Worth & Denver City Ry. Co. v. Smith*, 206 Fed. 2d, 667, there was evidence of a failure by the defendant to comply with an operating safety agreement and the failure to follow a custom of applying abrasives to limited areas such as platforms, walks and crossings. In *Anderson v. Elgin, Joliet & Eastern R. Co.*, 227 Fed. 2d, 91, the evidence showed that it was customary to spread salt, *not* in the yards generally, but at certain fixed areas where the employees worked and walked. A failure to do so resulted in an accident at one of those fixed areas, namely, a switch stand, where the plaintiff was required to work.

The *Anderson* case, as well as other decisions cited by the petitioner, *e.g.*, *Skidmore v. Baltimore & O. R. Co.*, 167 Fed. 2d, 54, involved the existence of ice on a comparatively small, limited and well defined area. It must be remembered, however, that in the present case the area involved is the entire yard of the respondent, through which there were no fixed paths and across which the

mployees travelled in constantly varying directions. The etitioner asserts that "this case is not concerned with relevant situations * * * where an employee walking random in the yard slips and falls on ice or where the ilroad has no way of knowing where an employee will ." (Petition, p. 16). This statement is inaccurate, misading, and contrary to all of the evidence presented. lthough, as the petitioner states, there was a certain place the yard where doubling over engines were serviced, the mportant fact is that the accident did not occur at that lace or at any other fixed working place. It occurred after he work was completed and while the petitioner was walkg back through the large yard area *where his route could ot possibly have been anticipated due to the normal movent of engines and cars and the placing of equipment at ifferent locations on the various tracks. The evidence is ndisputed that it was physically impossible for the emloyees going to and returning from the incoming penstock rack to follow any certain route through the yard* (R., 3, 44, 59, 67, 68, 84, 103). To avoid such an accident as his would require removing all of the snow from the entire ard area, in addition to somehow preventing the snow rom falling as it was at the time of the accident in question. The impossibility of the duty which the petitioner sugests has been recognized in a number of cases dealing with nclement weather conditions. In *Raudenbush v. Baltimore & O. R. Co.*, 160 Fed. 2d, 363, an employee was killed when e slipped on ice or snow on a brake sill of a car in the efendant's yards. The court, in holding that the evidence n the issue of negligence with respect to the snow or ice as insufficient to go to the jury, said:

> "It is a general rule of wide acceptance that since railroad companies have no control over the vagaries

> of the weather or climatic conditions that there is no liability for injuries resulting from the mere existence of ice or snow and disconnected from other circumstances." *Id.*, 366.

In the *Raudenbush* case, the employee slipped on ice or snow which was on one of some 930 cars. The court recognized that while the case involved the movement of only 14 cars, yet a similar duty of removing the ice or snow as urged by the plaintiff would exist as to all other cars similarly situated. In the present case, the petitioner testified that he slipped on a railroad tie (R., 87). Applying the reasoning of the *Raudenbush* case, if a duty existed to remove the ice on that single tie for the petitioner, a similar duty would exist as to all other ties in the yard. It is clear from the evidence that the yard covers a very large area within which there are miles of track and unquestionably thousand of ties. The statement of the court in the *Raudenbush* case, concerning the degree of care required, answers the contention of the petitioner in this case:

> "The degree of care to be exercised by a party must have some reasonable relationship to the ability of that party upon whom the duty is cast to perform such duty." *Id.*, 367.

The petitioner introduced no evidence as to the ability of the respondent to remove the snow and ice for the obvious reason that it appears on the face of the evidence presented that such a duty under the particular circumstances involved would be patently unreasonable and impossible to perform.

The principle of the *Raudenbush* case has been applied in a number of other cases, *e.g.*, *Detroit, T. & I. R. Co. v. Banning*, 173 Fed. 2d, 752; *McGivern v. Northern Pac. Ry. Co.*, 132 Fed. 2d, 213.

The cases cited by the petitioner involving alternative methods of doing work (Petition, p. 18) are all clearly distinguishable. None of them involves snow or ice, but instead they deal with factual situations so different from this case that they are of no value as authority. In addition, it should be remembered that in the present case there is absolutely no evidence that at the time in question the engine could have been serviced elsewhere or that any reasonable steps to prevent the accident could have been taken by the respondent under the circumstances existing in the yard area.

The present case does not purport to declare as a matter of law that there can never be a duty upon a railroad company to avoid hazards presented by snow and ice (*Cf.*, Petition, p. 17). The trial court and the appellate court simply held that *under the particular circumstances of this single case*, there was insufficient evidence of any negligence to properly permit the case to go to the jury.

CONCLUSION.

The claim of the petitioner that the Ohio courts have erected a judicial barrier between an injured workman and his right to trial by jury of a federal claim (Petition, p. 18) is completely without foundation. There is no absolute right to have a jury decide every Federal Employers' Liability Act case, and the decisions below resulted from the lower courts honestly discharging the responsibility which that Act imposed upon them. *Brady v. Southern Ry. Co.*, 320 U. S., 476. Their conclusions apply only to the particular evidence under consideration and have no ramifications beyond the borders of this lawsuit. No valid reason

arises, either from the nature of the question involved or from the merits of the decisions of the courts below, why this Court should grant an additional review of the case.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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